Community, Resource Rents and Tenure

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On December 11, 1997, when the Supreme Court of Canada decision in *Delgamuukw v. The Queen* (1997) 153 DLR (4) 193 was rendered, the constitutional arrangement between Canada and British Columbia effectively thereby was amended.

It no longer can be asserted that this Province exclusively may make laws in relation to "property" within its boundaries. That constitutional authority, derived from s. 92(13) of the *British North America Act*, at least in the matter of land, now must be shared.

Similarly, it is unclear what, if any, lands, including timber and wood thereon, the Province holds exclusive management and sales authority over as long has been assumed under the authority of s. 92(5) *BNA Act*.

In 1871, British Columbia agreed all sums due from lands, mines and minerals would belong to the Province subject to any Interest other than that of the Province. That constitutional arrangement found in s.109 *BNA Act*, post-*Delgamuukw*, and given any rational interpretation of the Supreme Court of Canada decision, must mean at minimum, resource rent now taken from Crown land will be subject to sharing beyond the exclusive benefit of the province's general revenue fund.

British Columbia earns a substantial part of its income by developing or harvesting land-based resources for exchange in a relatively open

export economy. This province's historic sense of itself and definition of community long has been welded to the resource base of that land.

To the extent people have participated in or been excluded from that resource economy very often also has been a function of the way community has been defined. Whatever are the academic subtleties from generation to generation, community at its core, invariably reflects the Webster Dictionary description of "people linked by common interests living in a particular place." If the devil be in the detail, then in this instance, the detail is determining what we accept as being the common interest.

Since the explosion of European contact with people of the Americas in the late 1400s, rarely has there been an instance of balance between the interests of transoceanic migrants and those of indigenous populations.

The North America Free Trade Agreement (NAFTA) countries have pursued three distinct policies to accommodate cultural difference. The notion of a cultural mosaic in Canada, the melting pot concept in the United States, and the idea of convergence in Mexico characterize each NAFTA country's respective constitutional, political, and economic development.

In the NAFTA countries, there has been a consistency in the marginalization of many indigenous populations. Indigenous populations of each country have advanced a request for respect of traditional lands. After talking has failed in each country, claims to pre-contact rights and land title have been asserted successfully in Court by indigenous people.

The decision in *Delgamuukw* is not an aberration from settled law by an isolated, out-of-tune Supreme Court of Canada. In fact, the decision builds upon a series of cases adjudicating aboriginal issues, and at its core does not deviate greatly from rulings made by other Courts in common law jurisdictions.

Delgamuukw evokes many responses. Perhaps the most unproductive response is pursuit of some legal or political silver bullet that can negate its impact. The sooner will it be the better that we accept that *Delgamuukw* is neither good, nor bad; that *Delgamuukw* is neither praise worthy, nor blame worthy; *Delgamuukw* is simply the law. It is a piece of the constitutional framework upon which we now will continue the ever-unfinished tasks of building our community.

For merchants of the status quo, the need to contemplate such a profound constitutional rearrangement will be unsettling. Those who trade on uncertainty may see short term opportunity. For most of us, *Delgamuukw* requires redefining many elements of what we call community and of what we see as our common interest, our community interest.

For most of this province's history, community interest has assumed that aboriginal title did not exist in British Columbia. Indeed "community" frequently has not been inclusive of aboriginal people. In the main, as a Province, we have actually or implicitly subscribed through our actions to the notion expressed by Premier Sir Richard McBride, who in 1909 was reported by the *Montreal Gazette* as stating that because the Indians had "accepted the white man's machinery, for the policing and general direction of the country, they tacitly confessed themselves conquered. Surely we do not have to go to war and injure a helpless people to technically perfect a title to any part of Canada." In 1973, the British Columbia government, reflecting those same values, unilaterally included the Kamloops Indian Reserve within the boundaries of the then newly amalgamated City of Kamloops. That decision was reversed in January, 1976 following a change of government.

By mutual consent reflecting a better understood common interest, the City of Kamloops and Kamloops Indian Band since have grown a broad community relationship that includes joint Council meetings; development of a major City recreation facility on land leased from the Band; common fire protection service; a common liquid waste management system; and mutual planning for future water, recreation, road, and development services. Today's relationship has built progressively from a set of values much different than that which was manifested in 1973.

While the values now active at Kamloops were not constitutionally mandated, they more importantly reflect a voluntary attitude shift by the community's decision-makers. The area's land now holds greater economic, environmental, cultural, social, and recreation value because enlightened self interest about the idea of what makes community gradually is being redefined.

Moving forward from December 11, 1997, finding the way to creatively benefit communities post-*Delgamuukw*, in some manner, will mean reallocating the resource rent and other bounty taken from British Columbia lands. Reallocation cannot be yet another add-on to the present resource extraction cost regime. That reallocation will not be imposed. Reallocation can come about only upon the new constitutional reality of this province being accepted by its elite and its decision-makers.

Perhaps the place of greatest opportunity, need, and risk for such a reallocation to begin is in working forests across British Columbia. That is the case, in part, because those forests now are the focus for much change and considerable community division. Using the fact of the decision in *Delgamuukw* could be the catalyst required to initiate that focus from a foundation point more fundamental than now is being considered.

For several years there has been a need for change in our forests. Change that augments stewardship, recognizes aboriginal claims, fosters innovation, enhances the annual cut, is attractive to capital, and supports creation of jobs. Achieving all or even any of those goals requires change to our foundational system of ownership and tenure. While understanding the need, and occasionally testing the waters, decision-makers have declined to visit the system at its foundation. Instead decision-makers of all stripes have chosen to maintain the tenure status quo, whilst piling onto it a veritable mountain of centralized regulation. That choice has been made in substantial part, because to test the foundations so fundamentally would provoke significant negative response from the many who have a vested interest in that status quo.

All too often, fundamental change in our province is advanced only after roundly vilifying what is being replaced. That process necessitates much focus on problems of the past and insufficient focus on opportunities for the future. In the context of forests, the tenure system has served beneficially in a number of respects. Most importantly, it has been the cornerstone around which relative economic stability has been made available to communities, especially in the interior. As a consequence, current social, physical, educational, health and cultural infrastructure was made possible, in contrast to consequential results of the earlier itinerant nature of mechanical conversion in the forests.

As the current tenure system has matured, we have witnessed a tendency to capital-intensive, centralized conversion facilities producing a relatively uniform dimensional wood product. That phenomenon works against creative species utilization, marginalizes innovators, diminishes good stewardship, reduces the resource's job potential, and has led to over-administration. The greatest imbalance from those results appears to visit itself on communities closest to the resource. Coincidentally, those communities often are places with relatively large aboriginal populations.

The current forest tenure system once was an extraordinarily powerful tool which rewarded innovators and created conditions for building the single most important economic engine in the province. Today, that same tenure system works against innovators and has become a major impediment to challenging the status quo in our most significant natural resource. If *Delgamuukw* does nothing else, it will cause the status quo to be challenged in every aspect of land use across British Columbia.

Responding to that challenge will be a seminal test for the leadership of our province in every community, every resource industry, and every public policy institution.

Shortly after the decision in *Delgamuukw* was given, Chief Herb George addressed members of the Shuswap Tribal Council and others, including myself, at a meeting in Kamloops.

Chief Jules invited me from the floor to speak. As I approached the speaking area, a thought occurred to me, and I talked about the inherent symbolism in having a successful plaintiff and one of the named (by office) unsuccessful defendants standing together on the same platform.

Symbolic in two important ways. From all trials there is a winner, which usually means there is a loser. If you pass over the chance for dialogue and eschew the ever-present opportunity to avoid litigation, the risk taken is that you will be the loser. My standing next to Chief George enabled Shuswap people to see a symbolic picture of the fact that trials lead to winning, or to losing.

The second and more important symbol seen that evening is that once the trial is over, people who have represented opposing positions can stand together to begin the task of openly moving forward in search of common interests.

Recognizing litigation leads to a kind of tyranny imposed by the word "or" as in winners or losers, all potential parties to future litigation surrounding issues of aboriginal title should reflect carefully before proceeding. The Crown ignored 115 years of opportunity to seek alternatives to litigation and, as a result, has had its constitutional authority amended, in the case of the Province; and likely must carry a significant financial obligation, in the case of Canada. Aboriginal communities likely have little to gain through further litigation, and potentially a good deal to lose as the details of occupancy, infringement, and justification are defined within the very real constraints articulated in *Delgamuukw* (see postscript).

If we so choose, post-*Delgamuukw*, we can move forward on several vexing issues rooted in how this land is used. Forests may be amongst the most important places to begin. The very nature of that resource speaks to the utility of finding common interest about its stewardship and use. To begin that journey will require the discarding of preconceived notions about ownership and tenure.

Should they choose, public policy leaders can decide on those changes, confident vested interests can be answered by asserting change is required following the Supreme Court of Canada ruling in *Delgamuukw*. In that regard, *Delgamuukw* may prove to be a heaven-sent opportunity to address, without preconditions, the intertwined issues of title, tenure, ownership, stewardship, community benefit, harvesting technique, and resource rents.

When the Supreme Court of Canada said aboriginal title is a burden on the Crown's underlying title, it did not thereby also say aboriginal

title is a burden on people. How we as people—aboriginal and non-aboriginal people alike—choose to address that Crown title burden will be a function of how we address our own responsibility to ourselves, to the law, and to our community.

Lands in this province were improperly taken, according to the very legal tradition brought here by those who did the taking. Common to all NAFTA countries are grievances from that taking, which must be settled honourably before any community can move forward. We can favourably settle grievances AND find a common community interest.

We do have choices. We can choose to argue about compensation or infringement or occupancy. We alternatively can focus on identifying a common community interest, from which a remodelled constitutional foundation for governance can be built.

Each of us bears some responsibility for the choice that will be made. May we be given the strength and grace to carry our own share of that responsibility.

Postscript

On January 20, 2000 Justice George Lamperson gave reasons for his Supreme Court of British Columbia judgement in *Chief Ron Ignace et al. (Appellants) and the Registrar of Land Titles, Kamloops Land Titles District (Respondent)* confirming the Registrar's refusal to register a certificate of pending litigation pertaining to an aboriginal title claim. This judgement relies upon and reaffirms the British Columbia Court of Appeal decision in *Ukw v. BC* (1987), 16 BCLR (2d) 145 (CA), which decision precludes an aboriginal title claimant from filing a *lis pendens* under the Land Title Act. Justice Lamperson ruled "there is nothing in the *Delgamuukw* decision which supports the Band's contention that *Ukw* no longer applies." The Lamperson ruling is being appealed. The appellants requested a five judge panel at the Court of Appeal to argue the *Ukw* decision should be reversed. That request was denied. The appeal was heard the last week of June, 2000.

The underlying issues involve the nature and extent of aboriginal title over lands registered in fee simple to owners of the property known as Six Mile Ranch, on which a significant equestrian, agritourism, golf, hotel, condominium, and marina development has been approved.

Using the Six Mile Ranch project as a test case to advance the value of *Delgamuukw* for aboriginal communities likely will prove to have been an unwise choice. Registering a *lis pendens* on development approved lands, usually has potential to induce a cash settlement from the developer. The Six Mile Ranch developer, however, has chosen to

litigate and apparently has the resources and will to see the issue through on legal principle. The Province has not pursued a monetary settlement of the aboriginal title claim and cannot compromise the fee simple interests without attracting great liability.

The fee simple / aboriginal title issues in the *Ignace* appeal are not unique to the Six Mile Ranch and the Court of Appeal decision will have impact on every fee simple title in British Columbia.

The underlying claim to aboriginal title at the Six Mile Ranch is not self-evident and has not been pursued by Skeetchestn Indian Band or the Secwepemc Aboriginal Nation through their own currently active litigation process. Details about occupancy, beyond the mere assertion of occupancy, so far have not been made evident. Meeting the *Delgamuukw* tests and discussion about infringement and justification will be an extraordinary challenge for the aboriginal title claimants at Six Mile Ranch.

Almost assuredly the *Ignace* case will stand as an example of why reliance on *Delgamuukw* for litigation which is not grounded upon a solid underlying claim of aboriginal title, may result in a substantial diminution of *Delgamuukw*'s value for all aboriginal communities.